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No. 95-157

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

UNITED STATES OF AMERICA, *Petitioner*,

v.

CHRISTOPHER LEE ARMSTRONG, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND
BRIEF OF WASHINGTON LEGAL FOUNDATION,
MARYLAND COALITION AGAINST CRIME, INC.,
PARENTS ASSOCIATION TO NEUTRALIZE
DRUG AND ALCOHOL ABUSE, INC., AND
ALLIED EDUCATIONAL FOUNDATION AS
AMICI CURIAE IN SUPPORT OF PETITIONER

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Date: December 14, 1995

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Pursuant to Rule 37.3 of the Rules of this Court, the Washington Legal Foundation, the Maryland Coalition Against Crime, Inc., the Parents Association to Neutralize Drug and Alcohol Abuse, Inc., and the Allied Educational Foundation respectfully move for leave to file the attached brief as *amici curiae* in support of Petitioner. Counsel for

Petitioner has consented to the filing of this brief, as have counsel for Respondents Robert Rozelle, Aaron Hampton, Freddie Mack, and Shelton Auntwan Martin. *Amici* have been unable to obtain the written consent of counsel for Respondent Christopher Lee Armstrong (albeit counsel for Mr. Armstrong did provide oral consent), thereby necessitating the filing of this motion.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with more than 100,000 supporters nationwide. While WLF engages in litigation and the administrative process in a variety of areas, WLF devotes a substantial portion of its resources to reform of the criminal justice system and the cause of victims' rights. To that end, WLF has appeared before this Court as well as other federal and state courts in cases addressing criminal law issues (*see, e.g., Davis v. United States*, 114 U.S. 2350 (1994); *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Payne v. Tennessee*, 501 U.S. 808 (1991)), as well as in cases addressing efforts to control the sale and use of illegal drugs. *See, e.g., Vernonia School District 47J v. Acton*, 115 S. Ct. 2386 (1995).

The Maryland Coalition Against Crime (MCAC) is based in Baltimore, Maryland and works for enactment of legislation that promotes tougher law enforcement measures and the rights of crime victims. It has devoted considerable resources toward adoption of the "Victims' Rights Amendment" to the Maryland Constitution.

The Parents Association to Neutralize Drug and Alcohol Abuse, Inc. (PANDAA) is a national organization devoted to eliminating drug use among young people. PANDAA works toward this end by sponsoring anti-drug classes and seminars, by distributing informational

materials, and by helping families with drug abuse problems in finding effective treatment.

The Allied Educational Foundation (AEF) is a non-profit charitable and educational foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study such as history, law, and public policy, and has appeared as *amicus* before this Court in a number of cases involving criminal law issues.

Amici are deeply concerned by the crack cocaine epidemic that has spread throughout the nation during the past decade. They support strong law enforcement efforts as a principal means of bringing that epidemic under control. They are concerned that the Ninth Circuit's decision, if allowed to stand, will undermine those efforts and will force prosecutors to bring charges in accordance with racial quotas in order to avoid selective prosecution claims.

Amici seek to file the attached brief because of their interest in promoting the safety and welfare of all segments of our society; they have no direct interest in the outcome of this case or of other cases raising similar issues and believe that they can assist the Court by providing a perspective that is distinct from that of any party.

For the foregoing reasons, *amici curiae* WLF, MCAC, PANDAA, and AEF respectfully request that they be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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December 14, 1995

QUESTION PRESENTED

Whether the court of appeals erred in holding that evidence that members of a particular race have been prosecuted for a particular offense is sufficient to justify an order requiring discovery from the government on a claim of selective prosecution, absent some evidence that prosecutors brought charges on the basis of race -- such as evidence that similarly situated persons of a different race have not been prosecuted for that offense.

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INTERESTS OF THE *AMICI CURIAE*

The interests of the *amici curiae* are set out fully in the Motion for Leave to File accompanying this brief.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* hereby adopt by reference the Statement contained in Petitioner's brief.

In brief, Respondents Christopher Lee Armstrong, Robert Rozelle, Aaron Hampton, Freddie Mack, and Shelton Auntwan Martin were indicted in 1992 in the United States District Court for the Central District of California on charges of conspiring to possess with intent to distribute, and conspiring to distribute, more than 50 grams of cocaine base (crack), in violation of 21 U.S.C. § 846. Four of the five Respondents were also charged with using or carrying a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c). Petition Appendix (Pet. App.) at 4a, 55a. According to the indictment, Respondents sold a total of 124.3 grams of cocaine base to confidential informants on seven occasions between February and April 1992; the informants reported that Respondents used multiple firearms during the sales. *Id.*, at 70a.

All of the Respondents are African American. They allege that the government has selected them for prosecution in federal court precisely because of their race.¹ In September 1992, the district court ordered the government to provide discovery to Respondents with respect to that allegation. *Id.*, at 5a. When the government informed the district court that it would not comply with the discovery order, the court in January 1993 dismissed the indictments as a sanction. *Id.*, at 7a. In 1994, a three-judge panel of the United States Court of Appeals for the Ninth Circuit reversed the dismissal of the indictment, finding that Respondents had failed to make a sufficient showing of

¹ If convicted, Respondents face ten-year minimum sentences on the drug charges and five-year minimum sentences on the firearms charges. Their potential sentences would have been considerably shorter had they been charged in state court.

selective prosecution to warrant a discovery order. *Id.*, at 68a-104a. The Ninth Circuit subsequently voted to rehear the case *en banc*; and in March 1995, the appeals court voted 7-4 to affirm the district court's dismissal of the indictment. *Id.*, at 1a-67a.

Respondents based their initial motion for discovery solely on an affidavit prepared by a paralegal employed by the Federal Public Defender for the Central District of California ("FPD"). The affidavit asserted that in all 24 cases closed by the FPD's office during 1991 involving cocaine base violations of 21 U.S.C. § 841 and/or 21 U.S.C. § 846, the defendants were black. *Id.*, at 71a. On the basis of that affidavit, the district ordered the government to: (1) provide a list of all cases from the prior three years in which the government charged both cocaine base offenses and firearm offenses; (2) identify the race of the defendants in those cases; (3) identify whether state, federal, or joint law enforcement authorities investigated each case; and (4) explain the criteria used by the office of the U.S. Attorney for the Central District of California for deciding whether to bring cocaine base charges federally. *Id.*, at 71a-72a.

On September 16, 1992, the government moved to reconsider the discovery order and attached to its motion several affidavits that attempted to explain its drug-charging policy. In responding to the motion to reconsider, Respondents attempted to bolster their selective prosecution argument with two additional declarations. The first declaration, made by one of the defense attorneys, stated that she had been told by a halfway house intake coordinator that in his experience treating cocaine base addicts, whites and blacks dealt and used the drug in equal numbers. *Id.*, at 6a. The second declaration, made by

another defense counsel, asserted: (1) he had represented only blacks in federal court on cocaine base charges; (2) he had never heard of nonblacks being prosecuted in federal court on cocaine base charges; and (3) in his conversations with unnamed state court judges, prosecutors, and defense attorneys, he had come to believe that California prosecutes many nonblack cocaine base offenders in state court. *Id.*, at 6a, 73a. The defendants also submitted a Los Angeles Times article which contended that blacks disproportionately commit cocaine base offenses. *Id.*

It is not clear from the district court's order whether she considered Respondents' additional declarations in denying the government's motion for reconsideration of the court's discovery order. The Ninth Circuit, however, did rely on those declarations to a considerable extent in affirming dismissal of the indictments. *See, e.g., id.*, at 22a-23a.

The Court granted the government's petition for a writ of certiorari on October 30, 1995, to consider whether the evidence submitted by Respondents was sufficient, as a matter of law, to justify a discovery order regarding Respondents' selective prosecution allegation.

SUMMARY OF ARGUMENT

Respondents contend that their indictments were improper because the indictments were the product of a racially discriminatory charging decision. However, the evidence of racially discriminatory intent submitted by Respondents to the district court does not begin to meet the heavy evidentiary burden that must be met before discovery is permissible. While Respondents have demonstrated that the overwhelming majority of those charged with cocaine

base offenses in the Central District of California are African American, there is no basis for inferring that racial discrimination is at work in the absence of a "comparison pool" to which the pool of federal cocaine base defendants can be compared. There is no reason to assume that cocaine base offenses will be equally prevalent among all racial groups in this country -- or even that there will be a rough equivalence.

Moreover, even if Respondents could demonstrate that the current system by which offenders are assigned to state and federal court is racially discriminatory, Respondents would still not be entitled to relief in the absence of evidence that they personally were victims of racial discrimination. This Court has made clear that -- except in limited contexts not applicable to this case -- courts should not infer that a litigant has been the victim of racial discrimination based on evidence that others similarly situated have been discriminated against.

In the absence of evidence from which racial discrimination can be inferred, the district court's discovery order must be reversed; that is true regardless what standard of review one applies to the district court decision.

ARGUMENT

I. RESPONDENTS FAILED TO PRODUCE ANY EVIDENCE FROM WHICH ONE COULD INFER THAT THEY WERE SELECTIVELY PROSECUTED ON THE BASIS OF RACE

In our criminal justice system, the government "retains 'broad discretion' as to whom to prosecute." *Wayte v. United States*, 470 U.S. 598, 607 (1985)(quoting *United*

States v. Goodwin, 457 U.S. 368, 380 n.11 (1982)). "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978).

This Court's reluctance to impinge on the executive branch's prosecutorial discretion rests on sound public policy principles. As the Court recognized in *Wayte*:

[T]he decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the criminal proceeding, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy.

Wayte, 470 U.S. at 607.

One narrow limitation on the government's prosecutorial discretion is that, under the equal protection component of the Fifth Amendment, the government may not select whom to prosecute "based upon an unjustifiable standard such as race, religion, or other arbitrary classification." *Oyler v. Boles*, 368 U.S. 448, 456 (1962). A

defendant alleging that he is the victim of unconstitutional selective prosecution must, however, meet the exacting evidentiary standards imposed on anyone asserting an equal protection claim. *Wayte*, 470 U.S. at 608. In particular, anyone asserting that he has been selected for prosecution on the basis of race must demonstrate that the prosecutor acted with a racially discriminatory purpose and would not have brought charges but for the defendant's race. *Id.* at 608-09.

A. The FPD Affidavit Points to No Valid Comparison Pool or Evidence that Those Similarly Situated Were Not Charged

None of the evidence submitted by Respondents to the district court comes close to raising even a colorable basis for believing that they were selected for federal court prosecution because they are African American. The piece of evidence upon which Respondents most strongly rely (and which was the sole basis for the district court's initial discovery order) was the affidavit indicating that all 24 cocaine base cases closed by the FPD's office in 1991 involved black defendants. As the Ninth Circuit dissenters cogently explained, that statistic provides absolutely no grounds for an inference that the U.S. Attorney's office was making racially discriminatory charging decisions.

First, while the Court has on occasion permitted an inference of racially discriminatory intent based on statistical evidence, such an inference is permissible only when the proponent can demonstrate a disparity of some sort in the racial composition of the observed group versus the racial composition one would expect in the absence of intentional discrimination. *See, e.g., Whitus v. Georgia*, 385 U.S. 545, 552 (1967)(racially discriminatory intent

may be inferred where there were only 1/3 as many blacks on grand jury venire as one would expect if veniremen had been chosen randomly from among county residents). Here, Respondents have introduced no evidence regarding the percentage of blacks one would expect to find among FPD clients facing federal cocaine base charges in the absence of racially motivated charging decisions. In the absence of such evidence, there is no basis for concluding that 24-out-of-24 black FPD defendants is evidence of racially discriminatory intent.

The Ninth Circuit tried to sidestep that obvious evidentiary deficiency by asserting:

Given the prevalence of all kinds of drugs throughout our community, at least some crack distributors are likely to be non-blacks. We must start with the presumption that people of all races commit all types of crime. . . absent some compelling contrary evidence, we must assume that crime knows no exclusive race or creed. 6/

6/ Accordingly, the dissent's repeated calls for a "comparison pool" misses the point. . . Certainly, no "comparison pool" is necessary when the record contains statistical evidence tending to show that only members of racial or ethnic minority groups have been prosecuted. Were we to conclude otherwise, we would be accepting unwarranted racial stereotypes. Of course, as we explain, the government is free either to show that the record is incomplete or that a reasonable explanation exists for the statistical evidence. That is what the government has failed to do here.

Pet. App. 19a & n.6. In other words, in order to avoid what it viewed as "unwarranted racial stereotypes," the appeals court reversed the evidentiary burden and imposed on the government the burden of establishing the proper comparison pool. That burden-shifting maneuver was in direct conflict with *Wayte* and other decisions of this Court that have made plain that the evidentiary burden at all times remains with a defendant claiming unconstitutional selective prosecution.

Second, the Ninth Circuit (in the passage quoted above) seemed to make much of the "inexorable zero" -- the absence of *any* non-blacks among those federal cocaine base defendants whose cases were being handled by the FPD's office. However, the government's un rebutted evidence demonstrated that the alleged "inexorable zero" was a statistical mirage: the FPD's office was handling several federal cocaine base cases involving nonblacks during 1991 (those cases just did not happen to close during 1991), and seven federal cocaine base cases involving nonblacks defendants were initiated by the U.S. Attorney's office in 1992 (the year in which charges were first brought against Respondents). See Pet. App. 53a-54a. Viewed in conjunction with the statistical evidence introduced by the government, the FPD affidavit is stripped of all probative value that might otherwise have been derived from a showing that 100% of a "random" cross-section of federal cocaine base defendants were black.

Moreover, Respondents have introduced absolutely no evidence that the 24 cases examined in the FPD affidavit were randomly selected. The Ninth Circuit attempted to bolster the FPD affidavit by asserting that the criterion used to select cases -- cases closed during 1991 -- was "a factor independent of and not correlated with race"; but

that assertion is totally unsupported by the record and is yet another example of the Ninth Circuit's effort to shift the evidentiary burden away from Respondents. Indeed, *amici* would be quite surprised if there was any measure of randomness whatsoever in the FPD's choice of selection criteria. The FPD had an obvious interest in presenting the district court with the starkest racial picture possible, and that interest would be served by examining several groups of cases selected using varied selection criteria and then presenting to the district court the group of cases containing the fewest number of nonblack defendants.²

While Respondents' evidence indicates that the overwhelming number of those facing cocaine base charges in federal court in Los Angeles are black, it does not

² *Amici* do not mean to suggest that FPD personnel acted in any way improperly. It would be well within the bounds of zealous advocacy to utilize whatever case-selection criteria would support Respondents' selective prosecution claim most strongly. *Amici* do suggest, however, that in the absence of evidentiary support, it would be naive to assume that the 24 cases examined in the FPD affidavit were randomly selected.

The use of "cases closed" as a selection criterion seems on its face to be highly unusual — thereby suggesting a nonrandom explanation for the choice of that criterion. Cases are assigned district court numbers based on when they are filed, not when they are closed; thus, if one were seeking an easy way to retrieve a group of cases from a given time period, one would be much more likely to employ a "cases opened" selection criterion. Moreover, if one were really seeking to discover whether there existed a racial pattern in prosecutorial decision-making in a given time-frame (in this case, 1992 — the year Respondents were charged), "cases closed" would be a strange case-selection criterion, because cases selected using that criterion would reflect prosecutorial decisions made over the course of a lengthy time period (in this case, 1988 through 1991).

constitute acceptance of "unwarranted racial stereotypes" to accept the possibility that certain crimes are more prevalent among members of one racial group than among members of other groups. The record evidence strongly supports that hypothesis. For example, Respondents introduced into evidence a Los Angeles Times article indicating that blacks disproportionately commit cocaine base offenses, and that the racial composition of powder cocaine offenders much more closely mirrors the racial composition of the overall population. Pet. App. 73a. The Ninth Circuit dissenters noted numerous other examples: in 1991, whites constituted 100% of those convicted of antitrust law violations nationwide (Pet. App. 67a); while in 1993, black constituted 87.9% of those convicted of federal cocaine base offenses nationwide. Pet. App. 40a n.4. One must conclude either that all U.S. Attorney offices across the country are selectively prosecuting blacks for cocaine base offenses, or that cocaine base offenses are significantly more prevalent in the African American community than among members of other racial groups. *Amici* submit that the first of those two conclusions is not supported by any evidence in this case; accordingly, one cannot reasonably draw any inferences that federal prosecutors in Los Angeles are basing prosecutorial decisions on race from the FPD affidavit.

Finally, even if one were to accept the FPD affidavit at face value, it is simply too small a sample to raise an inference of racially discriminatory motivation in prosecutorial decisions. Only a small percentage of those charged with drug offenses in the Central District of California are represented by the FPD's office; indeed, approximately 2,400 defendants were charged with drug offenses under 21 U.S.C. § 841 in the Central District during the period 1989 to 1992. C.A. Excerpts of Record

75-85. A defendant claiming selective prosecution cannot begin to meet the heavy evidentiary burden imposed upon him by *Wayte* if he relies solely on statistics derived from such a small percentage of the overall pool of cases.

The two declarations submitted by Respondents in connection with the government's motion for reconsideration add nothing to their case. The hearsay statements of the halfway house employee give no indication that the dealers and users with whom he was familiar were at all similarly situated to Respondents (who are alleged to be violent, major distributors of cocaine base). Similarly, the hearsay statements of the unidentified court personnel regarding the racial characteristics of state-court cocaine base defendants makes no effort to compare the conduct of those defendants to Respondents' alleged conduct. In the absence of such comparisons, the declarations provide no evidentiary support for a claim of racial discrimination.

Amici admit that it is theoretically possible for a defendant to prevail on a selective prosecution claim without demonstrating that other, similarly situated individuals were not prosecuted. For example, even if a defendant were the only person known by federal prosecutors to have violated a particular crime, the Fifth Amendment would prohibit prosecutors from deciding to press charges based on prejudice against members of the defendant's racial group. As a practical matter, however, very few defendants in those circumstances would ever be privy to evidence directly demonstrating the prosecutors' discriminatory thought processes. Thus, virtually the only way that a defendant can begin to demonstrate discriminatory intent is to introduce evidence that others similarly situated (similar, that is, but for some irrelevant characteristic such as race) were not charged. Neither the FPD affidavit nor

the two declarations subsequently proffered by defense counsel include any such evidence.

B. Statistical Evidence of Racial Disparities Is Insufficient as a Matter of Law to Demonstrate Selective Prosecution

The deficiencies in Respondents' evidence is much more fundamental than those outlined in the preceding section. Even if Respondent could establish racial disparities in cocaine base prosecutions in the Los Angeles area (i.e., that blacks who have committed cocaine base offenses are more likely than similarly situated whites to be charged in federal court), such evidence would be insufficient to create an inference of selective prosecution in *their particular cases*. In the absence of more direct evidence that Respondents were themselves the victims of racial discrimination, they cannot make out a case of selective prosecution.

McCleskey v. Kemp, 481 U.S. 279 (1987), is highly instructive on this point. *McCleskey* involved a black defendant who had been convicted of first degree murder and sentenced to death in the State of Georgia. Mr. McCleskey argued that his sentence violated, *inter alia*, the Fourteenth Amendment's Equal Protection Clause because Georgia's criminal justice system was much more likely to impose death sentences on those (such as McCleskey) who had killed whites than on those who had killed blacks. Mr. McCleskey supported that argument with an extensive study of Georgia capital cases (the "Baldus Study") that purported to show a strong correlation between the race of the victim and the imposition of a death sentence.

The Court assumed that the Baldus Study was statistically valid (*McCleskey*, 481 U.S. at 29 n.7) but nonetheless rejected Mr. McCleskey's equal protection claim. *Id.* at 291-97. The Court held that evidence that race may improperly have played a role in other death penalty cases did not create an inference that race had played a role in Mr. McCleskey's case. *Id.* at 293. Rather, the Court stated that Mr. McCleskey could succeed on his Equal Protection claim only by offering "evidence specific to his own case that would support an inference that racial considerations played a part in his sentence." *Id.* at 292-93.

The Court acknowledged that in some "limited contexts" it has accepted statistical disparities as proof of intent to discriminate against an individual litigant. *Id.* at 293. The Court cited two such "limited" examples: statistical disparities as proof of intentional racial discrimination in the selection of the jury venire in a particular district, and of discriminatory employment decisions in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.* *Id.* at 293-94. But the Court refused to extend its acceptance of statistical disparities to capital sentencing proceedings, because such proceedings are "fundamentally different" from venire-selection and Title VII cases. The Court made clear that one cannot infer from racial statistical disparities an intent to discriminate against an individual litigant except in those cases in which only a "few[]" variables are relevant to the challenged decision." *Id.* at 295. The Court expressed particular reluctance to permit attacks on individual death sentences based on state-wide statistical disparities because prosecutors play a large role in capital sentencing proceedings and there are valid "policy considerations" supporting the "traditionally wide discretion" afforded prosecutors in their decisions regarding whether to seek the

death penalty. *Id.* at 296. The Court noted that prosecutors' "decisions whether to prosecute and what to charge necessarily are individualized and involve infinite factual variations," thereby making it impossible to infer what motivated Mr. McCleskey's prosecutor based on what may have motivated other prosecutors throughout the state. *Id.* at 295 n.15.

McCleskey is on all fours with the instant case and forecloses Respondents' efforts to demonstrate racial motivation based on statistical disparities in the U.S. Attorney's overall charging policies. Even if Respondents could demonstrate that white cocaine base offenders are more likely to be charged in state court than are blacks, *McCleskey* dictates that Respondents would still not be entitled to an inference that prosecutors engaged in racial discrimination in *this* case. There are simply too many variables involved in the charging process to permit an inference that an overall pattern of racial discrimination infected every individual charging decision.

The charges brought against Respondents are not simply run-of-the-mill cocaine base charges. Rather, they are charged with selling more than 124 grams of cocaine base (2 1/2 times the quantity necessary to qualify them for 10-year minimum sentences) on seven occasions over a two month period. They allegedly used guns during the course of those sales. Thus, even if Respondents could demonstrate that the U.S. Attorney's office engages in racial discrimination in deciding whether marginal cases should be sent to federal or state court, such evidence would not suggest that armed, major African American drug dealers (as Defendants are alleged to be) are also the victims of racial discrimination. In the absence of *direct* evidence that prosecutors in *their case* are racially

motivated (or, at a minimum, evidence that armed, major dealers of cocaine base who happen to be nonblack are not being charged in federal court), Respondents cannot begin to make out a selective prosecution claim. The FPD affidavit is woefully inadequate in that regard: in addition to failing to address the issue of which offenders are not being charged in federal court, it simply lumps together all cocaine base offenders whose cases were closed by the FPD's office in 1991 without regard to the severity of the offenses involved.

In sum, Respondents have failed to produce any evidence from which one could infer that they were selectively prosecuted on the basis of race -- and thus Respondents cannot be said to have established a colorable basis for their selective prosecution claims.

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW IN ORDERING DISCOVERY

In their briefs opposing Petitioner's certiorari petition, Respondents repeatedly noted that the lower courts had not ruled in their favor on the selective prosecution claims but rather had simply ordered discovery on that issue. Petitioners assert that nothing more than a discovery dispute is at issue and that the district court was acting well within its discretion in ordering discovery. *See, e.g.*, Brief of Defendant Martin at 11-16.

Regardless what standard of review one applies to the district court's discovery order, that order cannot stand. There simply is *no* evidence in the record from which one could infer that Respondents were the victims of intentional racial discrimination. In the absence of such evidence, the discovery order (and the subsequent sanction of dismissal)

must be reversed under any conceivable standard of review.

Amici do not agree, however, with Respondents' contention that the district court's decision is subject to review under a lenient abuse-of-discretion standard. As the Ninth Circuit dissent noted (Pet. App. 45a-46a), reversal of a district court discovery order is appropriate where (as here) the district court "does not apply the correct law." In granting discovery, the district court was operating under an erroneous view of the law regarding when an inference of discrimination can be drawn from statistical evidence. The district court concluded that the FPD affidavit created inferences of racial discrimination that were sufficient to create a colorable basis for a selective prosecution claim, a conclusion that runs directly counter to *McCleskey*. It is entirely appropriate for this Court to correct that error of law notwithstanding the deference normally accorded a district court discovery order.

While the certiorari petition did not directly raise the issue of what legal standard a defendant must meet before he is entitled to discovery into the issue of selective prosecution, *amici* suggest that it may be appropriate for the Court to reach that question in light of the confusion it evidently has engendered in the lower federal courts. *Amici* believe that the precise verbal formulation employed (e.g., a "prima facie case" standard, a "colorable basis" in the evidence standard) is of less importance than it is to reemphasize that it is not easy to meet the standard. As the Court recognized in *McCleskey*, it would unduly drain the resources of prosecutors if they are forced to respond to run-of-the-mill selective prosecution claims. *McCleskey*, 481 U.S. at 296 n. 18 ("[I]f the prosecutor could be made to answer in court each time . . . a person charged him

with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law")(quoting *Imbler v. Pachtman*, 424 U.S. 409, 425 (1976)).

While nominally adhering to a "colorable basis" test for permitting discovery in selective prosecution cases, the Ninth Circuit directly repudiated earlier circuit precedent which had stated that "the colorable basis standard sets a 'high threshold' that should rarely justify discovery." Pet. App. 9a. The appeals court indicated that it viewed racially-motivated prosecutions as sufficiently condemnable so as to permit discovery whenever racial discrimination is suspected. The difficulty with that lenient standard is that it invites repeated selective prosecution challenges. The delay that is attendant to any discovery order would virtually always be to the defendant's benefit; the Ninth Circuit's lenient standard thus could quickly bog down prosecutors' offices in "chasing statistics." Pet. App. 67a. Petitioner's brief amply demonstrates that such a chase is already underway in the Ninth Circuit. Indeed, in *United States v. Turner*, No. CR 94-820 JSL, ___ F. Supp. ___, 64 U.S.L.W. 2276 (C.D.Cal. Oct. 12, 1995), a district judge in the Central District of California not only ordered extensive discovery into selective prosecution in a cocaine base prosecution but even suggested that the U.S. Attorney's focus on prosecution of violent street gangs was constitutionally suspect because of the "imbalance" in prosecutions caused by that focus.

This Court appeared to have a much tougher discovery standard in mind when it wrote in *McCleskey* that "a prosecutor need not explain his decisions unless the criminal defendant presents a prima facie case of unconstitutional conduct with respect to his case." *McCleskey*, 481

U.S. at 296 n.18. See also, *Wade v. United States*, 504 U.S. 181, 186-87 (1992)(no discovery permissible into prosecutor's motivation in absence of "substantial threshold showing" that prosecutor acted for impermissible reasons). *Amici* respectfully suggest that the Court take this opportunity to make clear that a prosecutor's normally broad discretion to make charging decisions without being subject to judicial review should not be overcome by anything less than a strong showing that the prosecutor has made racially motivated decisions.

The Ninth Circuit complained that unless a somewhat relaxed standard for granting discovery were adopted, defendants would be unable to gather sufficient information to prove their selective prosecution claims. See, e.g., Pet. App. at 14a. While *amici* concur in that assessment, they see no reason why the threshold for discovery should be lowered simply so that more defendants will escape punishment for their misdeeds. Prosecutors are not engaged in a game in which all participants should be afforded a "sporting chance" of winning. Rather, they are attempting to punish lawbreakers and thereby protect the public from future crimes. Their ability to do so is hampered when they are forced to devote considerable resources to fighting off selective prosecution claims. Racial discrimination among prosecutor should not be countenanced, but defendants who cannot on their own develop strong evidence of such discrimination should not be permitted to rummage through prosecutors' files in hopes of escaping punishment.

CONCLUSION

Amici curiae respectfully request that the Court reverse the decision of the Court of Appeals and direct that Respondents are not entitled to discovery in this case.

Respectfully submitted,

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